Chicago-Kent Law Review

Volume 70
Issue 1 *Symposium on the Admission of Prior Offense Evidence in Sexual Assault Cases / Symposium on Law Review Editing: The Struggle between Author and Editor over Control of the Text*

Article 18

October 1994

# Restriction of Judicial Election Candidates' Free Speech Rights after Buckley: A Compelling Constitutional Limitation

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# RESTRICTION OF JUDICIAL ELECTION CANDIDATES' FREE SPEECH RIGHTS AFTER *BUCKLEY*: A COMPELLING CONSTITUTIONAL LIMITATION?*

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## INTRODUCTION

The notion of an independent, impartial judiciary that decides cases based on their factual and legal merits, and not on any other considerations, is fundamental to our common law tradition. "There could hardly be a higher governmental interest than a State's interest in the quality of its judiciary," wrote Justice Potter Stewart.[1] The independence of the federal judiciary is underlined by the provision of life tenure on the bench.[2] While federal judges are appointed,[3] many states have chosen to elect at least some of their judges, either by retention elections,[4] or by partisan or non-partisan ballots.[5] In the forum of judicial elections, however, there exists a tension between the ideal of the impartial judiciary and our equally cherished ideal of free speech.[6]



** J.D. Candidate, Chicago-Kent College of Law, 1996. I wish to thank Professor Marc Grinker for his insights, close readings, and encouragement. Thanks also to Barbara, Patrick, and Michael, without whose profound patience and support this Note and my entire legal education would be impossible.

1. Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 848 (1978) (Stewart, J., concurring in the judgment).

2. The United States Constitution provides that "[t]he Judges . . . shall hold their Offices during good Behaviour, and shall . . . receive for their Services a Compensation, which shall not be diminished during their Continuance in Office." U.S. CONST. art. III, § 1.

3. The President appoints federal judges with the advice and consent of the Senate. U.S. CONST. art. II, § 2, cl. 2; 28 U.S.C. §§ 44, 133 (1994).

4. In judicial retention elections, voters are faced with a ballot question of whether or not to retain a judge in office; that judge faces no ballot opponent. *See infra* text accompanying note 77.

5. *See* 28 THE COUNCIL OF STATE GOV'TS, THE BOOK OF THE STATES 210-12 (1990-91 ed.) [hereinafter THE BOOK OF THE STATES]. As of 1991, 42 states at least required some judges to undergo periodic retention elections, if not elections to office. The states which do not have judicial elections of any kind, and thus are not concerned directly with the topic of this Note are: Delaware, Hawaii, Massachusetts, New Hampshire, New Jersey, Rhode Island, Vermont, and Virginia. *Id.*

6. The First Amendment guarantees that "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I.

States that elect their judges often regulate the speech of judicial election candidates by statute.[7] Most states follow the American Bar Association's Model Code of Judicial Conduct (1972) ("1972 Model Code").[8] The 1972 Model Code provides in Canon 7(B)(1)(c) that a judicial election candidate "should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office"; should not "announce his views on disputed legal or political issues"; and should not "misrepresent his identity, qualifications, present position, or other fact."[9] The American Bar Association ("ABA") has recently considered whether this provision is overbroad, and has promulgated a revision, which is meant to address this concern as well as other concerns about limitations on judicial election campaigns.[10] Canon 5 of the revised Model Code of Judicial Conduct (1990) ("1990 Model Code") provides in part that a candidate for judicial office "shall not: (i) make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; [or] (ii) make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court . . . ."[11] Several states have now adopted the 1990 Model Code.[12]

The United States Supreme Court has never decided whether these strict limitations on judicial election campaign speech are permissible under the First Amendment. However, several federal appellate courts have addressed the issue, and until recently, there was no division among them: such restrictions were found to be constitutional.[13] In June 1993, the Seventh Circuit Court of Appeals ended this unanimity with its decision in *Buckley v. Illinois Judicial Inquiry Board*.[14] In an opinion by Judge Richard Posner, the court ruled that an Illinois statute modeled on the 1972 Model Code was unconstitutionally overbroad in its restriction of speech,[15] even though the stat-

7. *See, e.g.* ILL. SUP. CT. R. 67(B).

8. JEFFREY M. SHAMAN ET AL., JUDICIAL CONDUCT AND ETHICS § 1.02 (1990).

9. MODEL CODE OF JUDICIAL CONDUCT Canon 7(B)(1)(c) (1972).

10. Reynolds Cafferata, Note, *A Proposal for an Empirical Interpretation of Canon 5*, 65 S. CAL. L. REV. 1639, 1645-48 (1992).

11. MODEL CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(i-ii) (1990).

12. States that have adopted the 1990 Model Code include Wyoming, Nevada, and Nebraska. SHAMAN ET AL., *supra* note 8, §16.01 (Supp. 1993).

13. *See* Stretton v. Disciplinary Bd., 944 F.2d 137 (3d. Cir. 1991); Berger v. Supreme Ct. of Ohio, 861 F.2d 719 (6th Cir. 1988), *cert. denied*, 490 U.S. 1108 (1989).

14. Buckley v. Illinois Judicial Inquiry Bd., 997 F.2d 224 (7th Cir. 1993).

15. *Id.* at 231.

ute added a proviso for what judicial candidate speech is allowed.[16] This decision reversed the trial court's holding that the restriction was not overly broad because it could reasonably be interpreted to restrict only candidates' comments on matters likely to come before the court.[17] The appellate court found that such an interpretation would not save the statute from being unconstitutional because virtually any matter could come before a court of general jurisdiction.[18]

What is striking about the Seventh Circuit's conclusion in *Buckley* is that it appears to dismiss the 1990 revisions to the Model Code of Judicial Conduct, with their explicit reference to matters *likely* to come before the court, as sweepingly as it dismissed the statute at issue in the case, which was based on the 1972 Model Code. The *Buckley* decision portends trouble not only for many such statutes across the country, but for the ABA's considered attempt at revision.

Part I of this Note sketches the historical background necessary to analyze the quandary posed by *Buckley*. It traces the limitations allowed on the ideal of free speech generally, and on attorneys and judges in particular.[19] It briefly considers the history of the states' decisions to choose some form of judicial election rather than appointment and goes on to survey the states' methods of selecting judges, and the policy arguments for each method.[20] It analyzes the legal and policy considerations behind both the ABA's attempts to regulate judicial election candidate speech and the states' refinements of these provisions.[21] Part II presents the factual background of *Buckley* and the district court's and circuit court's analyses of the legal issues at play in the case.[22] Part III analyzes the 1972 and 1990 versions of the Model Code in light of compelling state interests in regulating judicial election candidate speech and overbreadth considerations under the First Amendment, and determines that both versions are unconstitu-

16. The "proviso" allowed a candidate to "announce his views on measures to improve the law, the legal system, or the administration of justice, if, in doing so, he does not cast doubt on his capacity to decide impartially any issue that may come before him." Ill. Sup. Ct. R. 67(B)(1)(c) (1992).

17. *Buckley*, 997 F.2d at 229. See Buckley v. Illinois Judicial Inquiry Bd., 801 F. Supp. 83, 95 (N.D. Ill. 1992) for the trial court's holding.

18. *Buckley*, 997 F.2d at 229. Some federal district court decisions and one state supreme court decision have also adopted a similar line of reasoning as Judge Posner's in *Buckley*. *See* Beshear v. Butt, 773 F. Supp. 1229, 1233 (E.D. Ark. 1991), *rev'd on other grounds*, 966 F.2d 1458 (8th Cir. 1992); ACLU v. The Florida Bar, 744 F. Supp. 1094, 1098 (N.D. Fla. 1990); J.C.J.D. v. R.J.C.R., 803 S.W.2d 953, 956 (Ky.), *cert. denied*, 112 S. Ct. 70 (1991).

19. *See infra* notes 27-66 and accompanying text.

20. *See infra* notes 67-115 and accompanying text.

21. *See infra* notes 116-152 and accompanying text.

22. *See infra* notes 153-192 and accompanying text.

tional.[23] Part III also argues that a less broad, constitutional rule nonetheless can be drafted under the *Buckley* view of the issue.[24] Part IV argues that the desire for an impartial judiciary does not fundamentally conflict with the election of judges. It suggests that reasoned free speech by judicial candidates may well be in the interest of a well-informed electorate and necessary to ensure a representative judiciary in a democratic society.[25] It also asserts that unfettered free speech by judicial election candidates does not necessarily militate in favor of merit selection of judges.[26]

## I. HISTORICAL BACKGROUND

### *A. Limitations on Free Speech*

The First Amendment prohibits Congress from passing any law which prohibits free speech.[27] The Fourteenth Amendment applies this provision to the states.[28] The First Amendment's protections, however, do not apply unconditionally to all speech, regardless of its context or content. For example, the common law has regulated defamatory speech by providing for civil damages when there is publicized speech or writing that "exposes a person to distrust, hatred, contempt, ridicule, or obloquy . . . or which has a tendency to injure such person in his office, occupation, business, or employment."[29] Many states have codified such common law provisions.[30] States may ban some areas of speech such as "fighting words," obscenity, and defamation because they contain constitutionally proscribable content of little social value.[31]

23. *See infra* notes 193-235 and accompanying text.
24. *See infra* notes 236-249 and accompanying text.
25. *See infra* notes 250-261 and accompanying text.
26. *See infra* notes 262-265 and accompanying text.
27. U.S. CONST. amend. I.
28. Edwards v. South Carolina, 372 U.S. 229, 237-38 (1963). The relevant provision of the Fourteenth Amendment provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.
29. Belli v. Orlando Daily Newspapers, Inc., 389 F.2d 579, 582 (5th Cir. 1967), *cert. denied* 393 U.S. 825 (1968).
30. *See, e.g.*, CAL. CIV. CODE §§ 44-46 (West 1989). The Supreme Court has limited such regulation in the case of public officials and public figures. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 342-43 (1974); New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964).
31. R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2543 (1992). For a broad treatment of restrictions of First Amendment rights in judicial election campaigns, see generally Elizabeth I. Kiovsky, Comment, *First Amendment Rights of Attorneys and Judges in Judicial Election Campaigns*, 47 OHIO ST. L.J. 201 (1986).

Political speech is accorded heightened protection in our constitutional framework. Free political speech is tolerated even when offensive "in the hope that use of such freedom will ultimately produce a more capable citizenry and a more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests."[32] The constitutional test for restrictions on political speech varies depending upon the type of restriction. Government may restrict the time, place, and manner of speech in a reasonable way if the restrictions (1) are not aimed at the content of the expression; (2) serve an important government interest; (3) leave alternative methods of expression available;[33] and (4) are clearly drafted so as to warn a citizen of what conduct violates it.[34] Thus, a federal law prohibiting the carrying of signs or banners on the public sidewalks surrounding the United States Supreme Court was held to be unconstitutional as it applied to the sidewalks because distinguishing those sidewalks from other public sidewalks in Washington D.C. did not serve an important government interest.[35] Restrictions that go beyond limiting merely the manner of expression to prohibit a specific type of speech must pass a more difficult test. They must be narrowly drafted, and serve not only an important state interest, but a compelling one.[36] Thus, a state's attempt to restrict the use of an obscentiy directed at governmental policy in a courthouse was struck down for lack of a demonstrated compelling interest by the state.[37] Content-based restrictions on speech "must be subjected to the most exacting scrutiny."[38] To pass such scrutiny, a

32. Cohen v. California, 403 U.S. 15, 24 (1971).

33. United States v. Grace, 461 U.S. 171, 177 (1983). The Seventh Circuit in *Buckley* characterized Illinois' rule as, in part, a restriction on time, place, and manner of speech in that a judge is restricted by the rule from certain speech at a certain time, namely the campaign period crucial to the voting public. *Buckley*, 997 F.2d at 228-29.

34. Smith v. Goguen, 415 U.S. 566, 572-73 (1974). In *Smith*, the defendant was sentenced to jail for violating a Massachusetts statute prohibiting the contemptuous treatment of the United States' flag by wearing a flag on the seat of his blue jeans. *Id.* at 568-70. The Court struck down the conviction on the ground that the law did not clearly spell out what was "contemptuous" treatment, and thus violated Goguen's Fourteenth Amendment rights to due process. *Id.* at 575.

35. *Grace*, 461 U.S. at 183-84. Whereas the majority held that the statute was unconstitutional in its application to the plaintiffs, who sought the right to pass out leaflets and carry signs on the sidewalks surrounding the Court, Justice Marshall in dissent found that the statute was unconstitutional on its face, without need of considering its application. *Id.* at 184.

36. *Id.* at 177. A compelling interest is more than an important interest, and justifies state restriction of free speech to some extent. *Id.*

37. Cohen v. California, 403 U.S. 15 (1971). In *Cohen*, the plaintiff had worn a jacket with the words "Fuck the Draft" on it inside a court building. *Id.* at 16.

38. Boos v. Barry, 485 U.S. 312, 321 (1988). The plaintiffs in *Boos* challenged a District of Columbia ordinance restricting any signs within 500 feet of a foreign embassy that would subject that government to "public odium . . . [or] disrepute." *Id.* at 312.

state must demonstrate not only a compelling interest, but that its law is essential to asserting that interest.[39]

The interest in protecting political speech is at its greatest during campaigns for public office.[40] Such speech gives meaning to the process at the heart of democracy.[41] Debate about political candidates is central to our system of government and is clearly protected by the First Amendment.[42] This is not to say that states have no interest in safeguarding the integrity of their election procedures.[43] There are many examples, however, where the states' otherwise legitimate efforts to protect the character of elections have failed to survive First Amendment challenges. For example, the Supreme Court found that a newspaper's publication of an allegation that a candidate for office had formerly engaged in criminal activities must be accorded at least as much protection as the press is allowed when public officials and public figures are involved;[44] the state's interest in protecting its citizens against defamation was not compelling enough to warrant inhibiting speech about a candidate for public office.[45] The Supreme Court likewise ruled that a Kentucky law designed to maintain an electoral system free from corruption was unconstitutional as applied to a candidate who ostensibly offered the voters a pecuniary promise by pledging that if elected he would reduce the salary of the office for which he was campaigning.[46] The Court also struck down California laws which prevented political parties from endorsing candidates in primary elections and mandated many restrictions on the internal governance of political parties. Although California claimed that the laws promoted stable government and protected voters from confusion and improper influence,[47] the Supreme Court found that there was no logical or empirical connection between the laws and their desired effects.[48] One relatively rare example of a restriction of political

39. Burson v. Freeman, 112 S. Ct. 1846, 1852 (1992). In *Burson*, a political campaign treasurer challenged campaign restrictions in and around a polling place. *Id.* at 1846.

40. Monitor Patriot Co. v. Roy, 401 U.S. 265, 271-72 (1971).

41. Brown v. Hartlage, 456 U.S. 45, 53 (1982).

42. Eu v. San Francisco County Democratic Cent. Comm., 489 U.S. 214, 223 (1989).

43. *Brown*, 456 U.S. at 52.

44. *Monitor Patriot*, 401 U.S. at 271. Public officials cannot prevail in a defamation action unless they can prove either "actual malice," that is, knowledge by the maker of the statement that the statement was false, or reckless disregard for the statement's truth or falsity. New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964). This principle was later extended by the Supreme Court to public figures who have placed themselves in public controversies. Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974).

45. *Monitor Patriot*, 401 U.S. at 277.

46. *Brown*, 456 U.S. at 61-62.

47. *Eu*, 489 U.S. at 225-26.

48. *Id.* at 226.

expression passing constitutional scrutiny involved a state statute that restricted the solicitation of votes and the distribution of literature within 100 feet of a polling place.[49] The Court found that the state's asserted interests in protecting freedom of the vote and providing integrity to the polling process were compelling, and that the restrictions did not needlessly infringe on campaign expression.[50]

The scope of a restriction on expression may determine the constitutionality of a statute. Prohibitions must "clearly carve out the prohibited political conduct from the expressive activity permitted . . . ."[51] If the restriction does not accomplish this goal, it is substantially overbroad, and therefore unconstitutional.[52] There must be a logical and tight connection between the government interest asserted and the effect of the statute.[53] Thus, the Court struck down a state statute that prohibited solicitation by charitable organizations that do not spend at least 75 percent of their funds for "charitable purposes" because the limitation had no causal connection between its effects and its stated intent of preventing fraud.[54]

The courts will interpret a statute so as to avoid constitutional questions unless such a construction patently contradicts the legislature's intent.[55] The root of this policy is the belief that constitutional issues should not be confronted unless absolutely necessary, and that Congress will not likely take its oath to uphold the Constitution lightly.[56] Federal courts should not find state statutes unconstitutional if a narrow constitutional construction can reasonably be given to them.[57] The courts, however, may not play the role of statutory revisors.[58]

Although states frequently restrict the speech of attorneys and judges, or speech concerning judicial matters, such restrictions must receive careful scrutiny. Many of these restrictions have been found unconstitutional. For instance, judges may not exercise contempt of court powers against those who criticize court proceedings still in pro-

49. Burson v. Freeman, 112 S. Ct. 1846, 1857 (1992).
50. *Id.* at 1856.
51. United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 579 (1973).
52. Secretary of State of Md. v. Joseph H. Munson Co., 467 U.S. 947, 964-65 (1984).
53. *See id.* at 966-67.
54. *Id.*
55. Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. and Constr. Trades Council, 485 U.S. 568, 575 (1988).
56. *Id.*
57. Virginia v. American Booksellers Ass'n, 484 U.S. 383, 397 (1988).
58. *Buckley*, 997 F.2d at 230.

gress when the comments are made outside of court.[59] States may not enforce provisions that bar the press from reporting on state disciplinary proceedings concerning judges.[60] Generally, states may not bar the public from attending criminal trials because such exclusion may impinge upon the public's and the press's right to see and hear, which is implicit in the right to speak.[61]

Some restrictions on the speech of attorneys and judges have been upheld as constitutional. Courts may compel the cooperation of attorneys in regulating speech about ongoing litigation to a greater extent than it can those who are not members of the bar,[62] although the Supreme Court has declined to set the precise boundaries of restriction of attorneys' speech.[63] The Fifth Circuit has upheld the constitutionality of a state statute based on a canon of the Model Code of Judicial Conduct that requires judges to resign before running in a campaign for non-judicial political office.[64] A state appellate court has found enforceable a trial judge's order prohibiting extra-judicial statements by attorneys and their staffs in order to ensure a fair trial involving a notorious defendant.[65] Courts may balance the interest of the state in restricting an attorney's expression against the attorney's First Amendment rights; attorneys' speech outside of court about pending cases may necessitate measures such as continuances, sequestration of witnesses, or change of venue that create burdens on the courts.[66] These cases illustrate that the Model Codes of Judicial Con-

59. Bridges v. California, 314 U.S. 252, 270-71 (1941).

60. Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 838 (1978).

61. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 (1980). The Court explained that rights not specifically enumerated are still recognized as implicit in enumerated rights. Thus, while the First Amendment does not explicitly mention the right to attend trials, the right of the public to see and hear is implicit in its right to speak. Other implicit rights that the Court mentions are the rights to privacy, association, and free travel, and the rights to be presumed innocent until proven guilty, and to be proven guilty beyond a reasonable doubt. *Id.* at 579-80.

62. Gentile v. State Bar of Nev., 501 U.S. 1030, 1057 (1991).

63. *Id.* at 1057-58. In *Gentile*, the petitioner attorney was disciplined for violating a rule that prohibited extra-judicial statements that may prejudice a court proceeding, but allowed certain types of statements notwithstanding the general rule. *Id.* at 1033. The attorney conducted a press conference in which he asserted his client's innocence shortly before his indictment. Before the press conference he studied the rule governing the matter and scrupulously tried to abide by it. *Id.* at 1041-42. The Court found that the state's application of the rule to him was unconstitutional in that his statements did no harm to either party's interest in a fair trial. *Id.* at 1033.

64. Morial v. Judiciary Comm'n of the State of La., 565 F.2d 295, 303 (5th Cir. 1977), *cert. denied*, 435 U.S. 1013 (1978). In *Morial*, the compelling state interest behind the rule was to insure that a judge may not take advantage of his position or appear to take advantage of his position during a hard-fought political battle. *Id.*

65. *In re* Kinlein, 292 A.2d 749, 759 (Md. Ct. Spec. App. 1972).

66. *Gentile*, 501 U.S. at 1057.

duct are founded upon some legitimate basis for restricting speech of attorneys and judges.

### B. Selection of Judges

The Declaration of Independence protested the sole control that the King of England maintained over the judiciary of the thirteen American colonies.[67] The original states did away with absolute executive control by having the legislature, or the governor and a council, or the governor and the legislature together, appoint judges.[68] The federal judiciary has always been appointed by the President with the advice and consent of the Senate.[69]

The first state to experiment with electing judges was Georgia in 1812.[70] Mississippi had the first completely elected judiciary in 1832.[71] From 1845 when New York adopted an elected judiciary, until 1958 when Alaska joined the Union, all new states provided that the voters would select judges.[72] The belief that judges were too often wealthy and privileged,[73] and thus insufficiently sympathetic to ordinary people, motivated the early movement toward the popular election of judges. Even some of the original states that had established appointed judiciaries decided to provide for direct election of judges; North Carolina did so in 1868.[74]

Incompetence and corruption in the elected judiciary led to a backlash, notably in New York in the 1860s during the period of control by Tammany Hall.[75] Similar problems led Virginia, Vermont, and Mississippi to reject popular election of judges after a brief experiment with it.[76] In the early twentieth century, the American Judicature Society developed and began to promote an alternative plan: the

67. THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776). The signers protested that the King had "made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries." *Id.*

68. Glenn R. Winters, *Selection of Judges—An Historical Introduction*, 44 TEX. L. REV. 1081, 1081-82 (1966).

69. The Constitution provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the Supreme Court." *See* U.S. CONST. art. II, § 2, cl. 2; 28 U.S.C. §§ 44, 133 (1994).

70. Winters, *supra* note 68, at 1082.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Tuesday, February 11, 1868: The Day North Carolina Chose Direct Election of Judges—A Transcript of the Debates from the 1868 Constitutional Convention*, 70 N.C. L. REV. 1825, 1825 (John V. Orth ed., 1992) [hereinafter *Transcript of Debates*].

75. Winters, *supra* note 68, at 1083. Tammany Hall was the corrupt political machine that controlled New York City government in the 1860s.

76. *Id.*

governor of a state would nominate judges to vacancies from lists of candidates provided by a non-partisan commission. After a period of time, the selected judges would face a retention ballot.[77] The ABA endorsed this proposal in 1937, and in 1940 Missouri was the first to adopt it.[78] Several states adopted features of this "Missouri Plan," including Alabama, Alaska, Kansas, Iowa, Nebraska, Illinois, Florida, Colorado, and Utah.[79]

The states have a multitude of methods for selecting judges. Even within each state, there is often a variety of ways to name and retain judges, depending on the level or jurisdiction of the court. In some states which have no judicial elections of any sort, a nominating commission provides the governor with a list of candidates. Choosing from the list, the governor appoints judges with the advice and consent of the state legislature or of some other body.[80] Other states appoint judges at some, but not all, levels. In these states, governors, mayors, municipal councils, and higher-level judges are among those responsible for making the appointments.[81]

While a few states rely solely on partisan ballots to select judges,[82] others utilize only non-partisan elections to select their judges.[83] A number of states use partisan elections at least at some level or some point in the process,[84] while others have at least some non-partisan ballots as part of their judicial selection process.[85] In several states, the only judicial elections are retention elections, where the question before the voters is whether a particular judge should be retained in office. All of these states provide that the governor initially appoint someone from lists developed by judicial nominating

77. *Id.* at 1084.

78. *Id.*

79. *Id.* at 1085-86.

80. *See, e.g.*, DEL. CODE ANN. tit. 10, § 1303 (1993); VT. STAT. ANN. tit. 2, § 10(b) (1993). For a broad summary treatment of the states' methods of judicial selection, see THE BOOK OF THE STATES, *supra* note 5, at 210-12.

81. *See, e.g.*, MISS. CODE ANN. § 21-23-3 (1993); WYO. STAT. § 5-3-301 (1993).

82. *See, e.g.*, ARK. CONST. art. 7, §§ 5, 16, 29; ARK. CONST. amend. 58 § 1; ARK. CODE ANN. §§ 16-13-102, 16-13-309. (Michie 1993).

83. *See, e.g.*, KY. CONST. § 117; FLA. STAT. ch. 105.011 (1993); KY. REV. STAT. ANN. § 118A.010 (Baldwin 1993); MICH. COMP. LAWS § 600.8204 (1992).

84. *See, e.g.*, ALA. CONST. amend. 328, § 6.13; ILL. CONST. art. 6, § 12(a); MISS. CODE ANN. §§ 9-4-5, 9-5-1, 9-7-1, 9-9-7, 23-15-991, 23-15-997, 23-15-1013 (1993); TENN. CODE ANN. §§ 16-4-102, 16-18-201 (1993).

85. *See, e.g.*, IDAHO CONST. art. VI, § 7; S.D. CONST. art. V, § 7; GA. CODE ANN. § 21-2-138 (1993); OHIO REV. CODE ANN. § 3505.04 (Baldwin 1994); S.D. CODIFIED LAW ANN. § 12-9-1 (1994); WYO. STAT. § 5-5-111 (1993).

commissions.[86] Finally, some states utilize retention elections for judges at some point during their tenure, but also hold contested judicial elections for some vacancies.[87] There are no other relatively easy generalizations; one must consult the code of each state to fully comprehend its methods of selecting and retaining judges.

The policy arguments for and against each state's system of selection are obviously as varied as the states' methods. We can, however, simplify the debate into arguments for and against an elected judiciary. The rationale behind the election of judges may be stated simply. Since judges were never figures with popular support, either when under the King's control or when appointed by governors or legislatures, politicians, particularly in the nineteenth century, were quick to agitate against judges who obstructed their programs.[88] At the time of the earliest adoption of judicial election procedures, those in favor of judicial elections argued that if the people were able to elect lawmakers, they were capable of electing all public officials, including those who interpret the law.[89] In the 1830s President Andrew Jackson led a populist movement that promoted popular control over all elements of a democratic society.[90] Although some feared the corruption of the electoral process, many argued that appointment of judges offered no alternative, because the governors and legislatures were more corrupt than the people.[91] In the Reconstruction-era South, some African Americans also argued that popular election of judges would dislodge racist and reactionary judges from the bench.[92] The modern corollary to this argument is that judicial elections, conducted in fairly-drawn districts, will help break down the hold of the white male power elite on the judiciary.[93]

86. *See, e.g.*, COLO. CONST. art. VI, § 25; IOWA CONST. art. V, §§ 16-17; UTAH CONST. art. VIII, § 9; ALASKA STAT. §§ 22.05.100, 22.07.060, 22.10.150, 22.15.195 (1993); IOWA CODE §§ 46.1-46.16 (1993); KAN. STAT. ANN. §§ 20-2904, 20-2908 (1992); UTAH CODE ANN. § 20-1-7.7 (1993).

87. *See, e.g.*, CAL. CONST. art. 6, § 16; ILL. CONST. art. 6, § 12(d); MONT. CONST. art. VII, § 8; S.D. CONST. art. V, § 7; FLA. STAT. § 105.041 (1993); IDAHO CODE § 34-1217 (1993).

88. Joseph R. Grodin, *Developing a Consensus of Restraint: A Judge's Perspective on Judicial Retention Elections*, 61 S. CAL. L. REV. 1969, 1971 (1988). This movement was part of an overall dramatic shift toward democratization of government. *Id.* at 1971 n.8.

89. *Transcript of Debates*, *supra* note 74, at 1839.

90. Grodin, *supra* note 88, at 1971.

91. *Transcript of Debates*, *supra* note 74, at 1839.

92. *Id.* at 1845. At the North Carolina Constitutional Convention of 1868, delegate "Galloway (negro) favored election by the people. He said that . . . the Judiciary in New Hanover was a bastard born in sin and secession. In their eyes, it was a crime to be a black or loyal man." *Id.*

93. *See, e.g.*, Rorie Sherman, *Is Mississippi Turning?*, NAT'L L.J., Feb. 20, 1989, at 1.

Many argue that the election of judges is essential to maintain the legitimacy of the judiciary. One of the key tests of a government's legitimacy is that it derives its power from the people and is chosen by the people. Many theorists have concerned themselves with the legitimacy of the judiciary[94] because many judges are not chosen by the people. Judges are supposed to decide cases only on their factual and legal merits. Electing judges ensures accountability, and thus ensures that judges decide cases on this proper basis. To elect judges, it is argued, is to guarantee democratic popular control, and thus increases the legitimacy of the judiciary. At the same time, this strengthens the independence of the judiciary by eliminating the potential for powerful politicians who have played a major role in a judge's appointment to improperly influence outcomes of litigation.

On the other hand, the arguments against the popular election of judges revolve around the belief that the election of judges detracts from judicial impartiality instead of ensuring it. Apart from having a long and deeply rooted history in the common law, the notion of judicial impartiality is also codified in the Model Code of Judicial Conduct: "[a] judge should be faithful to the law and maintain professional competence in it. He should be unswayed by partisan interest, public clamor, or fear of criticism."[95] An elected judge in theory is accountable to the voters, or at least to the majority views held by the electorate. This accountability can conflict with the theory that the judge is accountable to nothing but truth and the law. Opponents of judicial election have argued that judges should *not* represent the people, but only the justice that the state owes to its citizens.[96] Judges should be learned, wise, independent, honest, and unafraid to enforce the law against even the popular will.[97]

Several arguments flow as corollaries from this principal objection. First, some argue that the election of judges will involve the political parties and their agendas in the process and so will interfere with judicial impartiality.[98] A corrupt and powerful political machine,

94. *See, e.g.*, ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 100 (George Lawrence trans., Anchor Books 1969 ed.) (13th ed. 1850); H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958); Ronald Dworkin, *"Natural" Law Revisited*, 34 U. FLA. L. REV. 165 (1982).

95. MODEL CODE OF JUDICIAL CONDUCT Canon 3(A)(1) (1972); A similar provision can be found in the 1990 Model Code at Canon 3(B)(2).

96. *Transcript of Debates*, *supra* note 74, at 1838.

97. *Id.*

98. *Id.* One participant at the 1868 North Carolina constitutional convention noted that "[o]ften [political party] conventions might put in nomination and into office influential politicians for the sake of votes." *Id.*

such as that of Tammany Hall in New York City, may even overtly interfere with justice.[99] That many states have chosen non-partisan judicial elections[100] is a response to that concern. Critics of this view reply that even if judges are appointed, politics will not be eliminated from the selection process because state politics and state bar associations intrude into the process,[101] and because appointed judges may be influenced directly or indirectly by those politicians who have the power of appointment.[102]

A second argument against the election of judges is that the system works against finding the most qualified candidates because many persons of the right temperament and character for the bench are deterred by the election and campaign process. Candidates must raise funds and attempt to placate campaign supporters; they are under pressure to advertise, to conduct direct-mail campaigns, to form campaign committees, and to announce positions that they may prefer to leave for further reflection or keep to themselves.[103] Critics of this view retort that since judicial qualifications are not readily defined, quantified, and objectified, this argument is not supported by empirical evidence.[104] Furthermore, critics argue that judicial appointees must likewise subject themselves to scrutiny by others and seek approval from those in a position to nominate and confirm them in order to assure a measure of competence.[105]

That voters are apathetic and lack knowledge about judicial candidates is another often-cited criticism of electing judges.[106] Voters, some argue, make their decisions about candidates on the basis of limited information. Voters are less able to identify their candidate preferences in judicial elections than they are in other elections.[107] Studies also show that voters in judicial elections make up their minds

99. Winters, *supra* note 68, at 1083. For a more modern example of the intrusion of political figures and organized crime into the judicial process, see Maurice Possley, *A Mystery Man Ignited Graft Probe*, CHI. TRIB., Dec. 23, 1990, at 1 (background history of the development of the Department of Justice's Operations Greylord and Gambat—investigations into widespread impropriety by judges and attorneys in Chicago).

100. See *supra* note 83, for a list of states that use non-partisan elections.

101. Lloyd B. Snyder, *The Constitutionality and Consequences of Restrictions on Campaign Speech by Candidates for Judicial Office*, 35 UCLA L. REV. 207, 255 (1987).

102. *Id.* at 258.

103. *See, e.g.*, Mary Ann Galante, *California Justices Face Own "Executions"; Bitter Campaign Focuses on Death Penalty*, NAT'L L.J., Nov. 3, 1986, at 1.

104. Snyder, *supra* note 101, at 253-54.

105. *Id.* at 254-55.

106. *Id.* at 252.

107. Lawrence Baum, *Voters' Information in Judicial Elections: The 1986 Contests for the Ohio Supreme Court*, 77 KY. L.J. 645, 661 (1989).

relatively late compared to other elections, giving credence to the view that voters have limited information to utilize when electing judges.[108] Thus, it is argued that informed members of state nominating commissions are much more able to make wise choices.[109] Yet, some have posited that these facts do not urge the repudiation of judicial elections, since even decisions made on a small amount of information may still be meaningful, and because a minority of well-informed voters (such as members of the bar) may determine the winners of those elections.[110] Voters in judicial elections often vote on the basis of party affiliation. That this is a rational method is supported by studies of judges' decisions that indicate that Republican and Democratic judges decide cases differently.[111]

Another criticism of electing judges is that a necessary part of running for office is raising funds, and that such an activity either is in fact a temptation to judges or gives the impression that judges may be swayed by political contributions.[112] The 1972 Model Code provides that "a judge should avoid impropriety *and the appearance of impropriety* in all his activities."[113] A notorious example of this problem is the Texas Supreme Court election of 1987 in which lawyers representing Texaco and Pennzoil contributed large amounts of money to several candidates while litigation between the parties was pending before the court.[114] The Model Code prohibits judicial candidates from directly receiving or soliciting campaign funds, requires the establishment of fund-raising committees, and prohibits revealing contributors' names to a judge unless otherwise required by law.[115] Nonetheless, the public may still be left to wonder about the influence of political contributions on judges when they are substantial and received from powerful litigants in important cases.

108. *Id.* at 667.

109. *Id.* at 646-47.

110. *Id.* at 668.

111. *Id.* at 649-50.

112. James J. Alfini & Terrence J. Brooks, *Ethical Constraints on Judicial Election Campaigns: A Review and Critique of Canon 7*, 77 KY. L.J. 671, 671-72 (1989).

113. MODEL CODE OF JUDICIAL CONDUCT Canon 2 (1972) (emphasis added). The 1990 Model Code substitutes the word "shall" for "should." MODEL CODE OF JUDICIAL CONDUCT Canon 2 (1990).

114. Alfini & Brooks, *supra* note 112, at 671. Texaco gave $72,700 to seven justices, and Pennzoil gave $315,000 while the case was before the court. Some of the judges were not even up for re-election. *Id.*

115. MODEL CODE OF JUDICIAL CONDUCT Canon 7(B)(2) and cmt. (1972); Canon 5(C)(2) and cmt. (1990).

### C. *Prescriptions for Judicial Candidate Speech*

The first systematic effort to regulate the conduct and speech of judges produced the ABA's Canons of Judicial Ethics, issued in 1924. The ABA intended the Canons to provide a guide for ideal conduct, rather than an enforceable code.[116] In 1964, the ABA began to re-examine the ethical principles to be applied to attorneys and judges. It concluded that it wanted to develop rules that recognized that "an independent judiciary cannot continue to exist unless the members of the judiciary not only comply with, but also are actively involved in establishing and enforcing, proper standards of conduct for judges."[117] This initiative resulted in the Code of Professional Responsibility in 1969 and the Code of Judicial Conduct in 1972.[118] This time the ABA intended that the standards be enforceable.[119] The 1972 Model Code was adopted, at least in substance, by forty-seven states, the District of Columbia, and the Federal Judicial Conference.[120]

Canon 7 of the 1972 Model Code provides that "a judge should refrain from political activity inappropriate to his judicial office."[121] This canon also addresses campaign conduct by judges and states a desire that judges control their families and employees and limit campaign speech and fund-raising activities.[122] It also includes within the scope of its limitations attorneys who are not incumbent judges, but who are running for judicial office.[123] This section of the Code is intended to address the inevitable tension in judicial elections between impartiality and electoral accountability.[124] Implicit in the Code is the belief that judges' personal opinions play no role in judicial decisions.[125] Most of the states that adopted the Code omitted or substantially modified portions of Canon 7; eleven did not adopt Canon 7(B)

116. SHAMAN ET AL., *supra* note 8, § 1.02 (1990).

117. E. Wayne Thode, *The Development of the Code of Judicial Conduct*, 9 SAN DIEGO L. REV. 793, 793 (1972). Mr. Thode was the Reporter of the ABA Special Committee on Judicial Standards. California Supreme Court Chief Justice Roger Traynor was Chairman of the Committee.

118. *Id.* at 793.

119. *Id.* at 796.

120. SHAMAN ET AL., *supra* note 8, § 1.02.

121. MODEL CODE OF JUDICIAL CONDUCT Canon 7 (1972).

122. Canon 7(B) provides that a candidate

> should maintain the dignity appropriate to judicial office, and should encourage members of his family to adhere to the same standards of political conduct that apply to him . . . [and] should prohibit public officials or employees subject to his direction or control from doing for him what he is prohibited from doing under this Canon.

*Id.* at Canon 7(B)(1)(a)-(b).

123. Thode, *supra* note 117, at 802.

124. *Id.*

125. Cafferata, *supra* note 10, at 1642.

concerning campaign conduct.[126] The Illinois version, for example, added the qualification to Canon 7(B)(1)(c) that a judge "may announce his views on measures to improve the law, the legal system, or the administration of justice, if, in doing so, he does not cast doubt on his capacity to decide impartially any issue that may come before him."[127] This provision was designed to give a candidate for a seat on the bench more latitude about what speech is allowed and what is not.[128]

The ABA revised the Model Code of Judicial Conduct in 1990. The new Code is meant to address more comprehensively the full gamut of selection processes often present in a single state.[129] Sections of the new Canon 5, analogous to Canon 7 of the 1972 Model Code, address general political activity by judges, appointed and elected judicial positions, and the conduct of incumbent judges. The applicable provision in the 1990 Model Code states:

> A candidate for judicial office . . . shall not (i) make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; [or] (ii) make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court . . . .[130]

The ABA intended this language to move away from the 1972 Model Code's "overly broad restriction on speech."[131] Several states have now adopted the 1990 Model Code.[132]

### *D. Discipline of Attorneys, Judges, and Court Employees*

Although some commentators suggest that one policy argument against Canon 7(B)(1)(c) is the ironic claim that judges frequently violate it with impunity,[133] there have been many instances in which judicial disciplinary boards have imposed sanctions on judges who have violated the rule. Judges' awareness of the provisions of the Code has actually contributed to much of the litigation on this question; judicial candidates file suit seeking declaratory and injunctive relief before the

126. SHAMAN ET AL., *supra* note 8, § 11.02. Many of those states were states which do not elect judges. *Id.* § 1.02.
127. Ill. Sup. Ct. R. 67(B)(1)(c) (1991).
128. *Buckley*, 997 F.2d at 229.
129. SHAMAN ET AL., *supra* note 8, § 16.18.
130. MODEL CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(i-ii) (1990).
131. Cafferata, *supra* note 10, at 1649.
132. These states include Wyoming, Nevada, and Nebraska. SHAMAN ET AL., *supra* note 8, § 16.01.
133. Cafferata, *supra* note 10, at 1648.

election campaign because they know that a controversial claim during the campaign is likely to result in discipline.[134] Discipline of judges for violations of Canon 7 takes part in the larger context of the courts' general permissiveness toward greater restrictions on the speech of attorneys and judges, and even court employees.[135]

Each state has established a board to investigate allegations of unethical conduct by judges and to discipline judges when necessary.[136] States have a similar board for attorneys.[137] An attorney's rights to free speech are unquestionably limited while inside a courtroom, and while a case is being litigated, comments about it outside of court are limited as well.[138] Not only have states constrained members of the bar in and around the court, but so too have they limited court employees in their rights inhering under the First Amendment. In one case, a state judge ordered a court attendant to resign her positions on the local mental health board, a youth guidance council, a HUD committee, and the local board of property tax assessments, and to cease serving as an officer of a local chapter of the NAACP.[139] In upholding the order, the New Jersey Supreme Court reasoned that the order was necessary to comply with the state rule implementing the policy of Canon 7.[140] The rule prohibits judges and all court employees from holding political office or engaging in political activity.[141]

Attorneys are also often sanctioned for criticizing the judiciary, even when the judiciary is elected and retained by popular vote, and even though attorneys are likely to be the most knowledgeable observers of the courts.[142] In one notable case, two attorneys sought to enjoin disciplinary proceedings against them for engaging in a campaign of public criticism of a prominent judge in which they stated that the judge had committed criminal offenses.[143] The disciplinary commission alleged that the lawyers had recklessly and vindictively tried to humiliate the judge in violation of their oath to respect the

134. *See, e.g.*, Stretton v. Disciplinary Bd., 944 F.2d 137, 139 (3d Cir. 1991); Berger v. Supreme Court of Ohio, 861 F.2d 719, 719 (6th Cir. 1988), *cert. denied*, 490 U.S. 1108 (1989); ACLU v. The Florida Bar, 744 F. Supp. 1094, 1096 (N.D. Fla. 1990).

135. *See infra* notes 136-41 and accompanying text.

136. Alfini & Brooks, *supra* note 112, at 680-81.

137. *Id.*

138. Gentile v. State Bar of Nev. 501 U.S. 1030, 1031 (1991). *See also In re* Kinlein, 292 A.2d 749, 751 (Md. Ct. Spec. App. 1972).

139. *In re* Randolph, 502 A.2d 533, 534 (N.J. 1986).

140. *Id.* at 548.

141. N.J. R. GEN. APPLICATION 1:17-2.

142. *See generally* Sandra M. Molley, Note, *Restrictions on Attorney Criticism of the Judiciary: A Denial of First Amendment Rights*, 56 NOTRE DAME L. REV. 489 (1981).

143. Eisenberg v. Boardman, 302 F. Supp. 1360, 1361-62 (W.D. Wis. 1969).

courts.[144] The district court rejected their complaint. The court held that the statute, as interpreted by the Wisconsin Supreme Court, was not facially overbroad.[145]

Apart from the litigation arising from parties seeking declaratory and injunctive relief before proceeding to speak, there are a number of cases that arise from the actual discipline of judges resulting from their election conduct. In *J.C.J.D. v. R.J.C.R.*,[146] a Justice of the Kentucky Supreme Court was suspended for three months without pay for criticizing both the standard of review for workers' compensation claims and laws prohibiting felons from carrying handguns.[147] In another case, a state disciplinary commission formally admonished a municipal court judge for stating during his campaign that he found plea bargaining unacceptable and that he would not allow it in his court if elected.[148] The Washington Supreme Court upheld the public censure of a judge who claimed that he was "[t]oughest on drunk driving," and that his opponent "receives the majority of his financial support from drunk driving defense attorneys . . . ."[149] The court reasoned that the judge's pledge to be especially tough on drunk drivers violated his duty to administer the law impartially, and that the statement about his opponent's contributors improperly suggested that justice was for sale.[150] The Kansas Supreme Court upheld the public censure of a successful judicial candidate who, while an attorney and not a judge, campaigned on a promise to be a "full-time" judge, while his opponent had been forced to reduce his docket because of health problems.[151] The disciplinary commission handed down a report of censure because it found that the judge's remarks went beyond making "pledges or promises of conduct in office other than the faithful

144. *Id.*

145. *Id.* at 1364. Ironically, to refute the plaintiffs' contention of facial overbreadth, the court referred to a Wisconsin Supreme Court case in which that court encouraged permissiveness toward attorney criticism of the courts. *Id.* The Eisenberg court quoted the part of the state court opinion which reads in part:

> Courts would be entering upon a dangerous field if they assumed to disbar attorneys because of criticism of courts based upon improper motives. It best conforms to the spirit of our institutions to permit every one to say what he will about courts, and leave the destiny of the courts to the good judgment of the people. They may err occasionally, but the combined sober judgment of the voters can be relied upon in the long run to protect the courts from calumny, abuse, and unfounded criticism.

*Id.* at 1363-64 (quoting *In re* Cannon, 240 N.W. 441, 454-55 (Wis. 1932)).

146. J.C.J.D. v. R.J.C.R., 803 S.W.2d 953, 954 (Ky.), *cert. denied*, 112 S. Ct. 70 (1991).

147. *Id.* at 954.

148. Beshear v. Butt, 773 F. Supp. 1229, 1231 (E.D. Ark. 1991), *rev'd on other grounds*, 966 F.2d 1458 (8th Cir. 1992).

149. *In re* Kaiser, 759 P.2d 392, 394 (Wash. 1988).

150. *Id.* at 396.

151. *In re* Baker, 542 P.2d 701, 704 (Kan. 1975).

and impartial performance of the duties of the office." Although the Kansas Supreme Court ruled that the judge's remarks did not violate the "pledges or promises" clause, it nonetheless upheld the censure because the candidate, in its opinion, also misrepresented a fact about his opponent's eligibility for a public pension.[152]

## II. *BUCKLEY V. ILLINOIS JUDICIAL INQUIRY BOARD*

### *A. Facts*

*Buckley v. Illinois Judicial Inquiry Board* involved two lawsuits which were consolidated for trial because each challenged the constitutional validity of Illinois Supreme Court Rule 67(B)(1)(c).[153] There were no factual disputes in either suit.[154] The first action was filed by Robert Buckley, a Justice of the Illinois Appellate Court who ran as an unsuccessful candidate for the Illinois Supreme Court in 1990. During the election campaign, Justice Buckley circulated literature which accurately claimed that he had "never written an opinion reversing a rape conviction."[155] The defendant Illinois Judicial Inquiry Board, the body charged with prosecuting judicial misconduct, filed charges against Justice Buckley for violation of Rule 67(B)(1)(c) on the theory that his statement could be construed as an implicit promise to hold appellants convicted of rape to a higher standard of review.[156] The defendant Illinois Courts Commission, the agency which adjudicates allegations of misconduct, determined that Buckley had violated the rule but declined to impose sanctions.[157] Justice Buckley filed suit in federal court seeking declaratory and injunctive relief on the grounds that the rule violated his right to free speech under the First Amendment and his right to due process under the Fourteenth Amendment.[158] The suit also named the individual members of the

152. *Id.* at 704-06.
153. 801 F. Supp. at 86.
154. *Id.* at 87.
155. *Buckley*, 997 F.2d at 225-26.
156. 801 F. Supp. at 105. The inquiry board also alleged, and the courts commission so found, that Justice Buckley also violated Rule 61 (Canon 1 of the 1972 Model Code) and Rule 62A (Canon 2(A) of the 1972 Model Code). *Id.* Canon 1 states in part: "A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved." MODEL CODE OF JUDICIAL CONDUCT Canon 1 (1972). Canon 2(A) states: "A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." MODEL CODE OF JUDICIAL CONDUCT Canon 2 (1972).
157. 801 F. Supp. at 105.
158. *Id.* at 86-87.

judicial inquiry board and the courts commission as defendants. The Illinois Judges Association intervened as a plaintiff.[159]

Anthony Young filed the other lawsuit involved in *Buckley*. Young was a lawyer and member of the Illinois General Assembly at the time that he ran successfully for Judge of the Circuit Court of Cook County in 1992. Judge Young filed suit prior to his election, arguing that the Rule 67(B)(1)(c) precluded him from addressing topics of importance to the electorate, such as "capital punishment, abortion, the state's budget, public school education, [and] public financing of health care," among other issues.[160] Judge Young maintained that the rule virtually coerced him into silence on these issues during his campaign.[161] His complaint named the Attorney Registration and Disciplinary Commission and the Illinois Judicial Inquiry Board as defendants, as well as the individual members of each. Judge Young also sought declaratory and injunctive relief.[162]

### *B. The District Court's Analysis*

The district court divided Supreme Court Rule 67(B)(1)(c) into four parts for purposes of discussion and analysis:[163] the "pledges or promises" clause,[164] the "disputed issues" provision,[165] the misrepresentation clause,[166] and, unique to Illinois, the "proviso" that explained what a candidate may legitimately discuss.[167] The court addressed various procedural issues that led to the conclusion that the three plaintiffs together had standing to dispute the entire rule.[168] In addressing the plaintiffs' challenges based on the First Amendment,

159. *Id.* at 83.
160. *Id.* at 106-07.
161. *Id.*
162. *Id.* at 86.
163. *Id.* at 88-89.
164. The "pledges or promises" clause reads: "A candidate . . . should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office . . . ." Ill. Sup. Ct. R. 67(B)(1)(c) (1991).
165. The "disputed issues" provision reads: "A candidate . . . should not . . . announce his views on disputed legal or political issues . . . ." *Id.*
166. The misrepresentation clause reads: "A candidate . . . should not . . . misrepresent his identity, qualifications, present position, or other fact." *Id.* The court did not address the misrepresentation clause because neither plaintiff had raised any objections to it. *Buckley*, 801 F. Supp. at 88-89.
167. The "proviso" reads: "A candidate . . . may announce his views on measures to improve the law, the legal system, or the administration of justice, if, in doing so, he does not cast doubt on his capacity to decide impartially any issue that may come before him." Ill. Sup. Ct. R. 67(B)(1)(c) (1991).
168. *Buckley*, 801 F. Supp. at 89-92. The court held that Justice Buckley had standing as to the "pledges or promises" clause, but not as to the "disputed issues" provision; it found that Judge Young had standing conversely as to the "disputed issues" provision, but not the "pledges

the court based its analysis on the rule posited by the Supreme Court in *Gentile v. State Bar of Nevada*[169] that restrictions on free speech imposed by a state must be weighed against the state's legitimate interest in regulating that type of speech. The *Buckley* district court characterized Illinois' interest as the maintenance of judicial impartiality and integrity in fact and appearance, so as not to breed disrespect for the law and encourage resort to extra-judicial remedies.[170]

The trial court found that the proviso saved the Illinois statute. The court distinguished the statute at issue in *Buckley* from a similar statute that was found unconstitutional in *ACLU v. The Florida Bar*[171] because the Florida provision did not contain the "proviso" that the Illinois rule contained. The court reasoned that the Illinois rule under challenge did not absolutely bar all speech, since it listed subjects that judicial candidates may freely address.[172] The court went on to consider whether there existed the proper connection between the interest to be achieved and the rule. The court held that the requisite nexus between the state's interest and the rule was present because it protected the integrity and impartiality of the judiciary without restricting all speech by the candidate; the rule permitted statements concerning a candidate's character and ideas about the administration of justice.[173]

The court next considered whether the valid restriction of certain speech by judicial candidates infringed upon other speech which should be protected. The trial judge adopted the findings of the magistrate judge's report on overbreadth, which concluded that neither the "pledges or promises" clause nor the "disputed issues" provision were so substantially sweeping as to make the rule constitutionally invalid on its face.[174] The magistrate addressed the plaintiffs' contention that the rule was unsuitably vague as to what speech is permitted and what is not by saying that "matters that come before the courts for adjudication are off limits for judicial campaign speech unless they fall within the proviso."[175] The court also held that the rule was not

or promises" clause. It found that the Illinois Judges Association had standing to challenge the entire rule. *Id.*

169. 501 U.S. 1030 (1991).

170. *Buckley*, 801 F. Supp. at 93.

171. 744 F. Supp. 1094 (N.D. Fla. 1990).

172. *Buckley*, 801 F. Supp. at 94.

173. *Id.* at 97.

174. *Id.* at 98, 122-23.

175. *Id.* at 123.

void for vagueness under the Fourteenth Amendment, and granted *sua sponte* summary judgment for the defendants.[176]

### C. *The Appellate Court's Analysis*

The Seventh Circuit Court of Appeals reversed the trial court's holding.[177] Judge Posner, who wrote the opinion, began the court's analysis by noting that neither plaintiff had argued that judicial elections are indistinguishable from elections for non-judicial positions, or that the state may not regulate judicial elections in a different manner from other elections.[178] The court expressed no discomfort with the notion that judges are different from other elected officials, and that the state's interest in regulating their speech should be evaluated accordingly.[179] The policy behind the rule, the defendants argued, is to prevent a judicial election candidate from making a promise that voters would later expect to be fulfilled by the judge, which would reduce the credibility of the judicial process in the community.[180] The court recognized that such commitments can be express or implied.[181]

The Seventh Circuit held that the restrictions on speech imposed by Illinois Supreme Court Rule 67(B)(1)(c) were overly broad.[182] As to the "pledges or promises" clause, the court reasoned that the rule banned all pledges or promises except to faithfully perform the duties of the office; it did not limit itself to pledges about particular types of cases. The court found that the "announce" clause (what the trial court referred to as the "disputed issues" provision) was likewise too broad in its scope, because it was not limited to "particular cases or class of cases."[183] The court found that while the rule effectively promoted the state's interest, it also, in essence, gagged judicial candidates:

> [T]he only safe response to the . . . [r]ule is silence. True, the silencing is temporary. . . . [But] [t]he only time the public takes much interest in the ideas and opinions of judges or judicial candidates is when an important judicial office has to be filled . . . . It is basically only during the campaign that judicial aspirants have an audience,

176. *Id.* at 98-101.
177. *Buckley*, 997 F.2d at 231.
178. *Id.* at 227-28.
179. *Id.*
180. *Id.* at 228.
181. *Id.*
182. *Id.*
183. *Id.*

> and literal compliance with the [r]ule would deprive the audience of the show.[184]

Unlike the trial court, the appellate court did not find the Illinois "proviso" to be a convincing force for alleviating statutory overbreadth. In the appellate court's view, the proviso was essentially at odds with the earlier clauses of Rule 67(B)(1)(c). What a candidate might say about improving the law could be construed as a pledge or a promise, or a position on a disputed issue.[185]

The court also found that the "disputed issues" or "announce" clause was overbroad, even in light of the trial court's efforts to restrict its interpretation to issues likely to come before that judicial candidate. In the Seventh Circuit's analysis, to limit a judge to not announcing an opinion on disputed legal or political issues by construing that limitation to refer only to issues likely to come before the candidate's court is to accomplish no outer boundary on the limitation at all. The court stated that "[t]here is almost no legal or political issue that is unlikely to come before a judge of an American court, state or federal, of general jurisdiction."[186] The court rejected the defendant's efforts to construe the statute to mean no more than Canon 5(A)(3)(d)(ii) of the revised 1990 Model Code, which states that a judicial candidate should not "make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court."[187] It also rejected the defense of the rule that some of the prohibitions were permissible and thus made the rule constitutional. The court relied on the Supreme Court's analysis in *Secretary of State v. Joseph H. Munson Co.*,[188] which invalidated a Maryland statute that prohibited charitable organizations from having fund-raising and administrative expenses greater than 25 percent of total expenses when conducting fund-raising activities because the law forbade both privileged speech and unprivileged fraudulent speech.[189]

The court also distinguished *Buckley* from *Stretton v. Disciplinary Board*,[190] a Third Circuit case which held a similar rule restricting the

184. *Id.* at 228-29.

185. *Id.* at 229. Judge Posner used the example that if a candidate declares that juries should not be allowed in state civil trials, others might interpret that position as questioning the ability of the candidate to impartially rule on issues particular to civil jury cases. *Id.*

186. *Id.*

187. *Id.* at 229-30. The court commented that, "[t]his suggestion is odd because the ABA itself sees a big difference between this language and the text of the challenged rule." *Id.* at 230.

188. 467 U.S. 947 (1984).

189. *Buckley*, 997 F.2d at 951, 968.

190. 944 F.2d 137 (3d Cir. 1991).

speech of judicial election candidates in Pennsylvania to be constitutional. In so doing, the court referred to what it called "precariously" distinguishable legal arguments, such as an understood limitation by the *Stretton* court on the "disputed issues" provision to campaign statements that left the impression that a case had been "prejudged."[191]

The Seventh Circuit concluded that while state regulation of judicial speech is appropriate under our constitutional scheme, it may not completely remove the process of judicial elections from the arena of free speech. The literal, intended, and reasonable interpretation of Canon 7(B)(1)(c), even as liberalized by Illinois, is silence.[192]

## III. First Amendment Analysis of Restrictions on Judicial Campaign Speech

### *A. Compelling State Interest*

One of the key tests in determining whether a restriction on speech is allowed under the First Amendment is whether there is a state interest which justifies it.[193] Framing the specifics of the issue is of great importance; what is the precise interest and the particular restriction? Here, the issue must be: is there a compelling state interest that justifies states in prohibiting an incumbent judge or an attorney, during the period of campaigning for election, from pledging or promising to do anything in office other than to faithfully carry out the job, and from announcing views on disputed legal or political issues? Similarly, does limiting speech concerning matters likely to come before the candidate's court, as the 1990 Model Code requires, rather than limiting discussion of disputed legal or political issues, arise out of a compelling state interest?

The broad interest at stake, of course, is the integrity and impartiality of the state's judiciary, both in fact and in appearance. Judicial integrity and impartiality are essential for courts to have credibility with the people, which is a prerequisite for people to obey the law. If this interest were the only one at work in the topic under discussion, any restriction on the speech of judges would be constitutionally justifiable. Even the *Buckley* court, the most authoritative critic of Canon 7(B)(1)(c), recognized that there is generally a very strong state interest in restricting the speech of those who are participating in the judi-

191. *Buckley*, 997 F.2d at 230.
192. *Id.* at 231.
193. *See supra* notes 33-39 and accompanying text.

cial process.[194] The narrower, and more troubling, question is what measures are necessary to protect the courts' integrity and impartiality without unduly restricting First Amendment freedoms and the values they protect. That question relates to the proper tailoring of restrictions so that they limit only the speech necessary to serve the state's legitimate interest, and no more.[195]

While there are no Supreme Court cases which address the restriction of judicial speech during election campaigns, the recent decision in *Gentile v. State Bar of Nevada*[196] concerning limitations on the speech of attorneys about pending litigation is illustrative. Justice Kennedy wrote:

> [O]ur cases recognize that disciplinary rules governing the legal profession cannot punish activity protected by the First Amendment, and that the First Amendment protection survives even when the attorney violates a disciplinary rule he swore to obey when admitted to the practice of law.... We have not in recent years accepted our colleagues' apparent theory that the practice of law brings with it comprehensive restrictions, or that we will defer to professional bodies when those restrictions impinge upon First Amendment freedoms. [197]

In dissent in the same case, Chief Justice Rehnquist, quoting an earlier Supreme Court case, asserted that an attorney may not seek shelter from discipline for unethical conduct under the First Amendment; ethical behavior by an attorney, he wrote, may require "abstention from what in other circumstances might be constitutionally protected speech."[198] The problem with this argument is that it would prevent

194. *Buckley*, 997 F.2d at 228, 231. In the words of Judge Posner, "the principle of impartial justice under law is strong enough to entitle government to restrict the freedom of speech of participants in the judicial process, including candidates for judicial office, but not so strong as to place that process completely outside the scope of the constitutional guaranty of freedom of speech." *Id.* at 231.

195. *See* part III.B *infra* for the discussion on overbreadth.

196. 501 U.S. 1030 (1991). In *Gentile*, the plaintiff was disciplined by the state bar commission after conducting a press conference concerning his client, who was about to be indicted on criminal charges as part of an investigation that received widespread media attention in Las Vegas. *Id.* at 1033. The attorney's motivation was to prevent the jury venire from being poisoned by repeated prejudicial publicity. He also sought to protect his client, who was in poor health, from an onslaught of further negative public attention. *Id.* at 1042-43. On the evening before the press conference, the attorney and his colleagues researched an attorney's obligations under the state's rule prohibiting extra-judicial statements that "materially prejudic[e] an adjudicative proceeding." *Id.* at 1044. During the press conference, he declined to answer many questions on the basis that ethical considerations prevented him from doing so. *Id.* at 1049. After pointedly noting that an attorney who wished to observe the rule and studiously researched its meaning still found himself charged with its violation, the Court held that the rule was void for vagueness. *Id.* at 1048.

197. *Id.* at 1054 (citations omitted).

198. *Id.* at 1071 (quoting *In re* Sawyer, 360 U.S. 622, 646-47 (1959) (Stewart, J., concurring)).

attorneys from, among other things, acting to preserve an unbiased atmosphere in a jury venire or acting on behalf of clients out of court, by restricting attorneys from speech outside the courtroom that would be protected if uttered by a non-lawyer.[199]

We may arrive at the following conclusions concerning the state's interest in limiting the speech of judicial candidates. Because these restrictions are content-based, the courts should and will give them the most careful scrutiny.[200] It is clear that the state has a highly compelling interest in the integrity and impartiality of the judicial process.[201] That is to say that the states may at least constrict attorneys and judges when it comes to matters that are before a court.[202] This interest and these restrictions are in conflict with another highly compelling interest of the state in our political and legal framework: that of freely and vigorously contested elections.[203] The ideal of this interest is that free speech allows voters to become fully informed of the issues and personalities involved in the race, and thus intelligently exercise their right of popular control over governmental decision-makers. Judge Posner alluded to this ideal in *Buckley* as "the marketplace of ideas and opinions [that] is at its zenith when the 'customers' are most avid for the market's 'product'."[204] This state interest demands at its optimum virtually no restrictions on the speech of candidates. This interest tends to suggest that there is no state interest in restricting judicial candidates' speech to promises of faithful execution of the office. However, it is more precise to say not that the second interest here obliterates the first, but that the two are in conflict, and require balancing in order to arrive at a resolution. How the state can best achieve its interest in preventing judicial elections from de-

199. The majority opinion in *Gentile* explained such duties as follows:

> An attorney's duties do not begin inside the courtroom door. He or she cannot ignore the practical implications of a legal proceeding for the client. Just as an attorney may recommend a plea bargain or civil settlement to avoid the adverse consequences of a possible loss after trial, so too an attorney may take reasonable steps to defend a client's reputation and reduce the adverse consequences of indictment, especially in the face of a prosecution deemed unjust or commenced with improper motives. A defense attorney may pursue lawful strategies to obtain dismissal of an indictment or reduction of charges, including an attempt to demonstrate in the court of public opinion that the client does not deserve to be tried.

*Id.* at 1043.

200. Boos v. Barry, 485 U.S. 312, 321 (1988).

201. *See* Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 848 (1978).

202. What it means for something to be before the court is a matter of great importance, given the 1990 revisions to the Model Code and the Seventh Circuit's interpretation of them. *See infra* notes 231-35 and accompanying text.

203. *See supra* notes 40-50 and accompanying text.

204. *Buckley*, 997 F.2d at 228-29.

tracting from the credibility of the judiciary is the subject of the following sections of this Note.

### B. *Overbreadth: Are the Restrictions Properly Tailored?*

For a circumscription of First Amendment rights to be constitutional, the restriction must be drafted so that only conduct that imperils the state interest is prohibited. There must also be a proper relationship, or nexus, between the interest at risk and the regulations that are imposed.[205] Whether a statute is overbroad on its face,[206] rather than unconstitutional as applied to a particular person,[207] is a legitimate inquiry under three circumstances: (1) "in cases involving statutes which, by their terms, seek to regulate 'only spoken words;'"[208] (2) when a statute regulates the time, place, and manner of speech;[209] or (3) when a statute delegates discretion to local authorities without sufficiently clear standards.[210]

The canons of the 1972 and 1990 Model Codes that restrict judicial candidates' speech are vulnerable on the ground that the nexus between the state interest and the regulations is neither logical nor conclusive. The rules are based on

> the assumption that the rule enhances the impartiality of the judiciary. . . . But that . . . does not carry the burden of demonstrating nexus. Simply put, a partial judge is a partial [*sic*] [judge] regardless of whether he makes public statements that demonstrate his particularity [*sic*]. And a judge lacking in integrity will, unfortunately, lack integrity regardless of whether she states and discusses her views of disputed political issues.[211]

The trial court in *Buckley* dismissed this contention with the assertion that the rules are not meant to eradicate partiality, but only to promote impartiality.[212] Under that view, whether the rules have an actual affect on impartiality is not paramount as long as the public thinks

205. *See supra* notes 51-53 and accompanying text.

206. Facial overbreadth refers to a statute that is unconstitutional on its own terms, without consideration of how the statute has been applied. Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973).

207. A statute may not be overbroad on its face, yet still be overbroad as applied in a particular manner. *Id.*

208. *Id.* at 612-13 (1973). The more a case involves conduct, and the less it involves words alone, the more the ability to facially challenge a statute on First Amendment grounds becomes attenuated. *Id.* at 615.

209. *Id.* at 612-13.

210. *Id.*

211. *Buckley*, 801 F. Supp. at 97 (quoting plaintiff Young's objections to the magistrate judge's report).

212. *Id.*

that the members of the bench are impartial.[213] Do the Model Code canons really promote, in fact, an impartial judiciary? It is important to note that the 1972 Model Code does not apply to nominees for judicial posts.[214] Judicial nominees are often asked, and sometimes answer, questions by a confirming body, such as the United States Senate, regarding the candidate's opinions about issues.[215] Such answers would not be allowed by the Model Code. Yet, the nominating process of federal judges does not call into question the impartiality of the federal judiciary.

One may counterpose the strictures allowed by the Supreme Court in *United States Civil Service Commission v. National Ass'n of Letter Carriers*[216] as a defense of the imprecise nexus between limitations on judicial candidate speech and an impartial bench. There, the Court found that less sweeping provisions related to the political conduct of federal employees, though arguably providing a closer nexus to the state's concern in preventing a federal patronage army, would be less effective than a ban on political activity by federal employees. The Court in *Letter Carriers* did not require lesser restrictions to supersede the judgment of the legislative and executive branches.[217] Thus the nexus need not be a perfect one.

The underlying reasoning in *Letter Carriers* does not apply so clearly, however, to the matter at hand. Given that judicial nominees are allowed to exercise their judgment in testifying before confirming bodies in ways that allow themselves to be adequately understood without undermining the credibility of the bench, it can scarcely be argued that judges subject to election would not be sufficiently regulated by their own oaths and ethical precepts to avoid highly improper

213. *See* Snyder, *supra* note 101, at 214. *See also* Morial v. Judiciary Comm'n of La., 438 F. Supp. 599, 606 (E.D. La.) ("[T]he thin facade of the Canon . . . [is] designed to give the public the idea that even though judges are elected, that they are not necessarily required to engage in politics at election time."), *rev'd*, 565 F.2d 395 (5th Cir. 1977), *cert. denied*, 435 U.S. 1013 (1978).

214. MODEL CODE OF JUDICIAL CONDUCT Canon 7(B)(1) (1972). The 1972 Model Code applies only to "public election between competing candidates or on the basis of merit system election." *Id.* The 1990 Model Code extends the prohibition on judicial candidate speech by defining a candidate as "a person seeking selection for or retention in judicial office by election or appointment." MODEL CODE OF JUDICIAL CONDUCT Terminology (1990). This change drastically broadens the scope of the Code's restrictions. States considering the 1990 Code as a model should consider the impact of it on any positions on the bench which are appointed.

215. *See, e.g.*, 139 CONG. REC. S10,083-84 (1993) (statement of Sen. Biden) (the chairman of the Senate Judiciary Committee commenting on the testimony of Supreme Court nominee Ruth Bader Ginsburg on privacy and other unenumerated rights under the Constitution).

216. 413 U.S. 548 (1973).

217. *Id.* at 566-67.

candidate speech that would damage the judiciary.[218] Further, as this Note discusses in the next section, to accept the broader limitations would not be proper without evaluating whether there is a less restrictive way to effectively satisfy the states' compelling interest.[219]

Whether a statute restricting speech hits only its legitimate target and nothing else is a matter of close reading and statutory construction. In *Buckley*, the Seventh Circuit found that although the Illinois statute aimed at solving the conflicting interests, it failed to accomplish anything when it came to practical decisions about what a candidate may or may not say. The court found that the statute itself was internally inconsistent because whatever the statute allowed a candidate to speak about (promises of faithful performance, opinions about undisputed legal or political issues, or matters within the Illinois "proviso") could be interpreted as something prohibited by the statute in another section.[220] "[W]hat is given with one hand is taken away with the other," wrote Judge Posner.[221]

Other courts that agree with the Seventh Circuit's analysis in *Buckley* have found the rule to be so broad as to be likely to coerce a candidate determined to comply with the Model Code into silence.[222] One court noted the irony of minimizing the liberty of speech in the branch of government designated to protect constitutional freedoms.[223] Another court noted that the only safe thing for a judicial candidate to discuss was qualifications and personal background.[224] Another court, passing on a statute based on the 1972 Model Code after the ABA had adopted its 1990 revisions, indicated that if the state were to adopt the revision the restriction would be sufficiently

218. *See, e.g.*, J.C.J.D. v. R.J.C.R., 803 S.W.2d 953, 956 (Ky.), *cert. denied*, 112 S. Ct. 70 (1991). This argument relies on the foundation that Canon 1 ("A judge should uphold the integrity and independence of the judiciary.") and Canon 2 ("A judge should avoid impropriety and the appearance of impropriety in all his activities.") of the 1972 Model Code are sufficient restraints on judges without going further. *See also* ACLU v. The Florida Bar, 744 F. Supp. 1094, 1099 (N.D. Fla. 1990). In ACLU v. The Florida Bar the court stated:

> [T]he state wrongly assumes that members of a respected and learned profession cannot announce their views on legal and/or political issues without undermining the public's confidence in the objectivity of the judiciary. . . . [J]udges routinely exercise their discretion within the confines of the facts and the law. . . . That concern [with discretion] makes a judicial candidates' [sic] views on disputed legal and political issues anything but irrelevant.

*Id.*

219. *See infra* part III.B.

220. *Buckley*, 997 F.2d at 229.

221. *Id. See also* text accompanying note 185.

222. Beshear v. Butt, 773 F. Supp. 1229, 1233 (E.D. Ark. 1991), *rev'd on other grounds*, 966 F.2d 1458 (8th Cir. 1992).

223. *Id.*

224. ACLU v. The Florida Bar, 744 F. Supp. 1094, 1098 (N.D. Fla. 1990).

narrowed to be constitutional.[225] Indeed, the fact that the proponent of the Canon, the ABA, has itself acknowledged that Canon 7(B)(1)(c) is overbroad,[226] ought to give pause to any state still relying on it.

If we accept the rationale of the *Buckley* and *J.C.J.D.* courts, and that of the ABA itself, as definitive on the subject of the 1972 Model Code provision, the question becomes whether the 1990 revision sufficiently narrows the limitations to make them constitutional. *J.C.J.D.* prospectively says yes and *Buckley* prospectively says no. Under the Seventh Circuit's analysis in *Buckley*, the clause prohibiting a candidate from "mak[ing] pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office"[227] was as invalid as the announce clause,[228] which prohibited a candidate from "announc[ing] his views on disputed legal or political issues."[229] Because the 1990 revision to the Model Code made no changes to the "pledges or promises" provision, other than to strengthen the prohibition by substituting "shall" for "should,"[230] the Seventh Circuit would still strike down the canon on the basis of overbreadth of the "pledges or promises" clause alone. What makes the 1990 Model Code distinct is the replacement of the "announce" provision with a clause that says that a candidate shall not "make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are *likely* to come before the court."[231]

Central to this inquiry is the question of how to interpret the word "likely." The circuit court's opinion addressed this analysis by defining "likely" by its converse: "There is almost no legal or political issue that is unlikely to come before a judge of an American court, state or federal, of general jurisdiction."[232] This framework rejects the meaning of "likely" as "more likely than not," or "a greater than 50 percent probability." Instead, it asks whether an issue *could* come before a court; that is, whether something has a greater probability than zero. Changing Canon 5(A)(3)(d)(ii) to read "cases, controver-

225. J.C.J.D. v. R.J.C.R., 803 S.W.2d 953, 956 (Ky.), *cert. denied*, 112 S. Ct. 70 (1991).
226. *Buckley*, 997 F.2d at 230.
227. MODEL CODE OF JUDICIAL CONDUCT, Canon 7(B)(1)(c) (1972).
228. *Buckley*, 997 F.2d at 229.
229. MODEL CODE OF JUDICIAL CONDUCT Canon 7(B)(1)(c) (1972).
230. MODEL CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d) (1990).
231. *Id.* at Canon 5(A)(3)(d)(ii) (emphasis added).
232. *Buckley*, 997 F.2d at 229.

sies or issues that *may possibly* come before the court" is a reasonable restatement of the Seventh Circuit's interpretation.

This reading of the circuit court's opinion in *Buckley* leads to the criticism that the court's dicta regarding the propriety of Canon 5(A)(3)(d)(ii) are flawed because the statute says "likely," not "possibly." In reply, we may ask as a practical matter how a judicial election candidate is to act during a campaign if we insist that "likely" here means a greater than 50 percent probability? Of all the issues that may come before a court,[233] how is a judicial candidate to decide whether a given topic has a greater than 50 percent likelihood of coming before the court? Judge Posner's example of the war in Yugoslavia[234] might be an easy example of an issue with a relatively small probability of coming before a court, but what about any number of other issues that enter the typical courtroom in the United States? Should a candidate evaluate statistical data, if it exists, as to how often an issue comes before courts in general, or before that candidate's particular court, before deciding what to speak about? Furthermore, is the past a reliable guide to the future in this respect? It would be extremely difficult for any candidate for the bench to assess with statistical accuracy whether an issue may more likely than not come before the court in the future. Thus, the Seventh Circuit analysis of "likely" based on what is unlikely is entirely reasonable in practice. In that framework, the *Buckley* court is justified in concluding that the new rule still leaves candidates nothing of substance or import to address. Consequently, the 1990 Model Code is still fatally overbroad under this reasoning.[235] The question then becomes whether any rule restricting judicial campaign speech can be constitutional under *Buckley*.

233. Judge Posner lists an incomplete catalog of issues: substantive due process, economic rights, search and seizure, the war on drugs, excessive police force, prison conditions, product liability, free-market economics, race relations, the civil war in Yugoslavia, health care reform, jury trials, pre-trial release, plea bargaining, criminal sentences, the death penalty, abortion, gun control, the Equal Rights Amendment, drug laws, gambling, liquor licenses, dram shop legislation, labor law, property taxes, condominium regulation, court rules, previous court decisions, and hypothetical legal questions. *Id.* at 228-30.

234. Judge Posner takes the example of the civil war in the former Yugoslavia as a subject usually remote from courts in the United States, yet still forbidden from comment by judicial election candidates because it is a "disputed legal or political issue[ ]." *Id.* at 229.

235. A statute which is not clear in detailing what is permitted speech or conduct and what is not permitted is unconstitutionally vague. Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972).

### C. *Can the 1990 Canon Be Redrafted to Satisfy* Buckley*?*

Whether the restrictions on judicial candidate speech can be successfully redrafted to meet the requirements of *Buckley* is of pressing concern to Illinois, and of great concern to other states in the Seventh Circuit. It is certainly of interest as well to all states that utilize some form of judicial election as they ponder whether to adopt the 1990 revisions or some other language. Does *Buckley* mean that states with judicial elections must choose between allowing completely unfettered campaign speech by candidates, or giving up on such elections altogether?

First we must consider the "pledges or promises" clause, common to both versions of the Model Code. Implicit in the Code is a view of judging that denies the impact of personal biases in decision-making.[236] The opposite view is that all court decisions reflect nothing but the personal political proclivities of judges. Even the middle-ground position allows that personal opinions inevitably enter into some cases calling for policy decisions about what is best for society. In the highest court of a jurisdiction, such cases make up the majority of cases.[237] Only the wholly impartial view of judging would require candidates to renounce all pledges or promises other than the faithful administration of justice. That view, however, does not reflect reality. On the other hand, it is uncontroversial that a judge can surely be restricted from pledging or promising to rule a certain way on any issue in a specific case now before that judge's court, or in one in which already identified parties may file a suit in the future.[238] The question is how to word the statute so as not to encompass speech or behavior that should not be restricted.

This limitation is the key not only to resolving the problem with the "pledges or promises" clause, but also with regard to the revised "disputed issues" provision contained in Canon 5(A)(3)(d)(ii) of the 1990 Model Code. The problem with the "disputed issues" provision is that it refers to "cases, controversies or *issues*."[239] The use of the word "issues" implicates the "disputed legal or political issues" that the ABA deleted from the 1972 Model Code. "Issues" draws in all of

236. *See supra* note 125 and accompanying text.

237. Grodin, *supra* note 88, at 1974-75. Professor Grodin was formerly a Justice of the California Supreme Court. He was voted out in the retention election of 1986, which focused heavily on Chief Justice Rose Bird and her views of capital punishment. *Id.* at 1969.

238. *See* Gentile v. State Bar of Nev., 501 U.S. 1030 (1991).

239. MODEL CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(ii) (1990) (emphasis added). The phrase "cases or controversies" is used in the constitutional clause that delegates authority to the judicial branch. U.S. CONST. art. III, § 2, cl. 1.

the possible subjects delineated by the circuit court in *Buckley*.[240] Limiting comment on current cases or controversies (in the constitutional sense of the word) has clearly passed constitutional scrutiny,[241] and is an established part of judicial ethics. According to the 1972 Model Code, "[a] judge should . . . except as authorized by law, neither initiate nor consider *ex parte* or other communications concerning a pending or impending proceeding."[242] Similarly, "[a] judge should abstain from public comment about a pending or impending proceeding in any court."[243]

While Canon 5 of the 1990 Model Code is a step in the right direction by narrowing the restriction in order to pass constitutional scrutiny, it could be narrowed further to meet the reservations expressed by the Seventh Circuit in *Buckley*. The following proposed rule should pass a constitutional test:

> A candidate[244] for a judicial office shall not:
> (i) make pledges or promises of conduct in office regarding any pending or impending proceeding before the candidate's court;
> (ii) make statements that commit or appear to commit the candidate with respect to pending or impending cases or controversies[245] that may reasonably appear likely to come before the court.

This proposed rule would explicitly address the analysis of *Buckley* concerning the word "likely" by the addition of the notion of "reasonable" likelihood. It would also allow discussion of any issue that was not pending or related to specific litigation with identified parties that is reasonably likely to come before a candidate's court. How would a candidate judge whether a case would possibly reach his court? Common sense must guide the candidate, the judicial disciplinary commissions, and the public. For example, a supreme court judge of a state may readily assume that an appeal concerning a high-profile murder conviction will likely reach the state's highest court, and will consequently avoid comment on any issues that have arisen in front of the

240. *See supra* note 233.

241. *Gentile*, 501 U.S. at 1056-57.

242. MODEL CODE OF JUDICIAL CONDUCT Canon 3(A)(4) (1972).

243. *Id.* at Canon 3(A)(6).

244. "Candidate" here means a candidate for an elected or appointed position on the bench, as defined by the 1990 Model Code. MODEL CODE OF JUDICIAL CONDUCT Terminology (1990). Thus, this proposed rule has the positive affect of applying to all judges.

245. "Controversies" should be understood not in its ordinary sense, but its constitutional one. "Controversies" under the Constitution refers to "Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under the Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens, or Subjects." U.S. CONST. art. III, § 2, cl. 1.

trial court in the same case. However, although the candidate may not express a view on whether a specific defendant might receive the death penalty, he may express a view on capital punishment in general. All that is then open to question is the degree of interest that the voters in a judicial campaign will possess in that or any other particular topic.

The Illinois Supreme Court has drafted another alternative. Its response to the Seventh Circuit's decision in *Buckley* is quite interesting in its attempt to satisfy the ruling. The section of the newly revised rule that limits the speech of judges reads:

> (3) A candidate for a judicial office:
>
> . . .
>
> (d) shall not:
>
> (i) make statements that commit or appear to commit the candidate with respect to cases, controversies or issues *within cases* that are likely to come before the court; or
>
> (ii) knowingly misrepresent the identity, qualifications, present position or other fact concerning the candidate or an opponent[.][246]

This rule goes beyond the prescription of this Note by completely eliminating the "pledges or promises" clause. It adopts the language of Canon 5(A)(3)(d)(ii) of the 1990 Model Code with one important addition: it adds the phrase "within cases" to modify "issues." This modification may also sufficiently address as well the concern over the overbreadth of the prohibition of speech about "issues"; however there still exists an ambiguity in this modifier as to whether it refers only to pending and impending cases, or more broadly, to categories of cases. Perhaps a narrower version should read, "or issues within pending or impending cases." If the disciplinary commissions and the courts do not read "issues within cases" broadly, the Illinois rule appears comfortably drafted around *Buckley* to survive further scrutiny.[247]

Wisconsin, another state in the Seventh Circuit, adopted an analogous rule before *Buckley* which is not based on either version of the Model Code. It reads:

> A judge who is a candidate for judicial office shall not make . . . promises or suggestions of conduct in office which appeal to the cupidity or partisanship of the electing or appointing power. A judge shall not do . . . anything which would commit the judge or appear

246. ILL. SUP. CT. R. 67(A)(3)(D)(I) (emphasis added). The amendments to this rule generally follow the format of the 1990 Model Code and refer to the rule as Canon 7.

247. The commentary to the new rule adds the proviso that, "as a corollary, a candidate should emphasize in any public statement the candidate's duty to uphold the law regardless of his or her personal views." ILL. SUP. CT. R. 67(A)(3)(D) cmt.

> to commit the judge in advance, with respect to any particular case or controversy or which suggests that, if elected or chosen, the judge would administer his or her office with partiality, bias or favor.[248]

This rule is also likely to withstand any challenge to it based on *Buckley* because it limits judicial candidate speech to that which would indicate bias in a *particular* case; this choice of words narrowly limits interpretations so as to avoid the possible problems posed by the words "issues within cases" in the new Illinois rule. Wisconsin's rule was decidedly more tolerant than the ABA's proscriptions even before *Buckley* demanded such an approach.[249]

## IV. POLICY CONSIDERATIONS

### A. *The Need for an Impartial Judiciary Does Not Conflict with the Election of Judges*

Implicit in the question of whether the need for an impartial judiciary conflicts with the election of judges is another, more fundamental one: what role do judge's opinions and biases play in judicial decisions? This question stands in the background because only the formalist view of judging, or its modern equivalent,[250] supports the concept that these preconceptions cannot and do not play a role. If they do not have a role, then any speech by a candidate for judicial office must be highly restricted. If such speech is not restricted, under this view, it will begin to interfere with the integrity and impartial appearance of the judiciary. This view promotes the belief that voters do not need to know candidates' positions on issues or their party affiliations; instead, the voters need only know about the experience and temperament of the judicial candidates.[251] Anything else that a candidate for the bench might say is irrelevant to the election process. This view underlies the Model Code of Judicial Conduct.[252]

248. WIS. SUP. CT. R. 60.15. This provision has been in effect since 1983. Whether the first sentence of this rule, referring to "promises or suggestions of conduct in office which appeal to the cupidity or partisanship of the electing or appointing power," would survive a challenge based on vagueness is beyond the scope of this Note.

249. The other state in the Seventh Circuit, Indiana, adopted Canon 5(A)(3) of the 1990 Model Code verbatim before the appellate decision in *Buckley*. IND. CODE ANN., Code of Judicial Conduct, Canon 5 (Burns 1993).

250. Grodin, *supra* note 88, at 1975. The modern version is Ronald Dworkin's Hercules model of judges who objectively apply social principles to cases. *See supra* note 94 and accompanying text.

251. Baum, *supra* note 107, at 648.

252. J. Scott Gary, Note, *Ethical Conduct in a Judicial Campaign: Is Campaigning an Ethical Activity?*, 57 WASH. L. REV. 119, 137 (1981).

Professor Joseph Grodin, a former justice of the California Supreme Court, who has a more realistic view of judging, describes it as follows:

> Some of what judges do is subject to rather rigid control by rule; some of what they do is very close to legislation; most of what they do takes place in a middle ground, in which the tension between constraint and discretion, between the objective and the subjective, is always present . . . .[253]

This picture recognizes that there is sometimes a place for a judge's personal policy judgments. If this is an accurate portrait of the judicial mind, information about a judge's positions on issues is relevant to the public, whether citizens vote for judges or whether someone appoints them. If such information about potential judges is relevant, then it follows that there is no reason that the popular election of judges is an impediment to impartiality.

Underlying the Model Code is the fear that judges will have firmly-anchored views on certain issues, and that such opinions will preclude judges from honestly and respectfully considering arguments made before the court by parties who hold opposing opinions.[254] An outgrowth of this fear is the notion that judges deciding cases will be bound by any public statements of their opinions on the issues because they will have to answer to the voters to whom they made the statements.[255] This belief is subject to the attack that all judges are constrained by the positions they have adopted in previous decisions on legal and policy issues.[256] Likewise, judges in states that utilize retention elections or periodic reappointment similarly face statements they made in election campaigns or before nominating bodies. Politicians and groups with an interest in the political process may oppose a candidate who does not live up to statements made before the first appointment or election.[257]

The issue accordingly should be framed as follows: what can potential judges say about the issues, and to whom are those comments best addressed? If we accept the moderate view of judging as involving discretion and personal beliefs at some times, we cannot accept the blanket prohibitions of either version of the Model Code of Judi-

253. Grodin, *supra* note 88, at 1976.

254. Snyder, *supra* note 101, at 228. One of Snyder's criticisms of Canon 7(B)(1)(c) is that it is under-inclusive in its attempt to deal with this problem because it only applies to elected judges. The 1990 Model Code does away with that objection. *See supra* note 215 and accompanying text.

255. Snyder, *supra* note 101, at 229.

256. *Id.* at 230-31.

257. *Id.* at 229-30.

cial Conduct. To do so does not eliminate any prejudices that judges may have, but rather "hide[s] their prejudices behind a facade of forced silence."[258] Consequently, the restrictions do not meet the requirement of nexus between a law's policy imperatives and its practical effect. If personal opinions form some part of the judicial decision-making process, then the opinions of candidates for judgeship must properly be a factor in deciding whom to put on the bench.[259] Those who decide who goes on the bench should ask, and potential judges should answer, questions about disputed political and legal issues in the freest manner possible, subject only to the most minimal restrictions necessary to preserve judicial impartiality in pending or impending cases.[260] A candidate's party affiliation is the beginning signpost in guiding voters or selection committees to that person's views on policy issues; thus, voters who consider party as one factor in voting for a judge are making a rational choice based on available information.[261] If we evaluate the merits of partisan judicial elections, only on the basis of voters' decision-making, there is no reason to require non-partisan elections for judges.

Who should be selecting judges is a policy decision for the people of each state to make. There is nothing about the free speech of judicial candidates that should lead to the absolute conclusion that an impartial judiciary is incompatible with one that is elected under conditions of free debate. Once we openly recognize that judges are not automatons who apply the algebraic formula of "Law + facts = decision" to all cases, we must also recognize that a candidate's opinion provides crucial information to those who are contemplating entrusting the candidate with the power of the courts.

### *B. Unfettered Free Speech by Judicial Candidates Does Not Necessarily Militate in Favor of Merit Selection of Judges*

If the reasoning of the Seventh Circuit in *Buckley v. Illinois Judicial Inquiry Board* influences other courts considering cases involving the campaign speech of judicial candidates, then states may be tempted to conclude that electing judges places the integrity of their judiciary at too great of a risk. Is free speech for judges a stalking

258. *Id.* at 235.

259. Other factors promoted by the Model Code can and should also receive consideration, such as experience, expertise, and temperament. *See* MODEL CODE OF JUDICIAL CONDUCT Canon 3 (1972).

260. *See supra* part III.C for the author's view of proper minimal restrictions on judicial candidates' speech.

261. Baum, *supra* note 107, at 650.

horse for the elimination of popular control of the judiciary that has been in vogue for almost two centuries? Does safeguarding judges' right to speak serve the interests of those who would vest control of state judiciaries in elite bodies of political and legal organizations? The analysis here suggests that this is not the case. A completely impartial judiciary is a goal and an ideal. To permit judges to speak about their views of disputed legal and political issues, whether before the public, a nominating commission, or a legislature, poses, at least in theory, risks to this ideal. To forbid such speech is to deny, in the most formalistic or Dworkinian respect, the role of personal beliefs in judging. It is to pretend with a wink and a nod that there is no such role, and to allow men and women to ascend to the bench without public knowledge of the beliefs that will influence their judicial choices.

The parties to a matter in litigation have a right to have their cases decided by a judge who has not discussed their specific case in a public forum. They have a right to a judge who will not make a decision about the facts, the law, and the policy arguments without first hearing them and reading them personally. They have a right to a judge who will make a decision that does not conform to that judge's personal beliefs if the law and the facts of the case so require.[262] Beyond those considerations, if we acknowledge that judges' beliefs play a role in some of their decisions, where discretion so allows, then we must likewise acknowledge that parties to a lawsuit have a right to appear before a judge who has been elected or selected by responsible people who had their ears open, and who were allowed to hear. To deprive litigants of that right is to subject them to the possibility that the judge before whom they appear has such widely and grossly ingrained predispositions that they may not receive a fair trial.

Professor Grodin objects to judicial elections because he believes that people simply vote for judges in an election based on whether or not they like the results of particular decisions. This type of decision-making eradicates the principle of the rule of law.[263] Professor Grodin posits other more acceptable models for voters to use in evaluating judges. He suggests that voters may recognize the rule of law, but reject judges whose subjective judgment, though exercised in the proper framework, diverges from their own. Alternatively, he pro-

262. Grodin, *supra* note 88, at 1974. Professor Grodin states: "I have cast my vote as a judge to apply statutes I would never have voted for as a legislator, in some cases to reach results that were counter to my own views of wise public policy." *Id.*

263. *Id.* at 1977.

poses that voters could analyze objective factors such as a judge's attitude toward precedent or toward the legislature. Yet he believes that these factors are too difficult for the public to track. Thus the voters fall back to the cruder analysis which rejects the belief in the rule of law.[264] He fears that a judge deliberating over a controversial case while facing election may consider (although perhaps subconsciously) voters' possible reactions to the decision.[265]

While these arguments are persuasive, we must ask if other decisions that voters make in a democracy are any less complex than the decisions they must make about judicial candidates. In any election, some voters will be superbly informed, others will be moderately informed, and some will base their choice ignorantly on some irrelevant or ill-considered criterion. A campaign for political office may poorly address the real issues just as a campaign for judicial election may oversimplify or ignore the proper focus of issues. Such pitfalls are part of representative democracy. We can attempt to minimize these pitfalls through regulation, but we cannot make them go away. The only way to permanently eliminate a judge's concern about tenure, whether the evaluation is by election or by reappointment, is to have life appointment to the bench as federal judges do. Only that provision can fully insulate judges from the pressure to conform their decisions to the beliefs of others. Whether state judges should have that degree of independence is another policy question for the public to decide. Whether judges should be subject to a retention procedure of some sort is beyond the scope of this Note. It will suffice to say that the problem of judicial selection cannot be resolved simply. Each state must decide who should choose the members of its judiciary. That candidates running for election have broad rights under the First Amendment should not be a major factor in deciding who has direct control over judicial selection.

The rule imposed by the 1990 Model Code can be saved if it only restricts comment on particular cases that are before the court or are likely to come before the court. This restriction on judicial and attorney speech is firmly rooted in our common law and constitutional schemes. The First Amendment will not support a greater restriction. Further, the public's interest in knowing how a judge will analyze cases is great; for the public to know, the candidates for judgeships must be encouraged and allowed to say what their positions are on

264. *Id.* at 1977-80.
265. *Id.* at 1980.

matters of public import and debate. Not to do so is to encourage a flawed, mechanistic view of judging, or to deliberately keep in the dark voters charged with the responsibility of selecting qualified members of the bench and to leave them unable to adequately exercise their role in a democracy. Each state must decide whether the risks of free judicial candidate speech are too great. If they are not, the states should endorse energetic debate on the part of candidates. If the risks are judged too great, the state should not continue to elect judges. The recognition of a realistic method of judicial decision-making should accompany either option. Judges and judicial candidates have pre-existing views on issues, learned in school, in practice, on the bench, and in everyday life. These views should be known to the public. The question ultimately is who should decide.

## CONCLUSION

The restrictions that most states have adopted on the ability of candidates for judicial office to speak freely are seriously called into question by *Buckley v. Illinois Judicial Inquiry Board.* Under the *Buckley* analysis, the 1972 Model Code of Judicial Conduct is fatally flawed. The 1990 revisions to the Code make substantial progress toward curing the defects of the 1972 version, but still fail First Amendment tests using the analysis of the Seventh Circuit in *Buckley.* The problem with the 1990 revision is that any issue can come before a court of general jurisdiction in the United States. Thus, a candidate bound to scrupulously follow the law must inevitably lapse into silence. Because that silence cannot be shown to improve the impartiality of our judicial system, general restrictions on the speech of judicial candidates must be found unconstitutional. States that value the popular election of judges over a system in which a small, elite segment of society recommends and appoints judges, must accept reasoned free speech by judicial candidates. However, if a state views judicial free speech as too great of a jeopardy to impartiality, the only alternative is to appoint judges rather than continue restricting their First Amendment rights and the voters' right to be informed about candidates on the ballot. Each state must decide as a matter of policy whether to elect or appoint its judges. Fewer restrictions on free speech by judicial candidates, however, do not inevitably require merit selection of judges, because all methods of judicial selection properly inquire into candidates' beliefs on disputed legal and political issues.